

## TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.  
IDS-14502/14

In Re Application Of: Venegas, Jr.

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
09/779,782	02/08/2001	S. Varner	25006	3635	6741

Invention: BARRIER COVER

COMMISSIONER FOR PATENTS:

Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on:

April 21, 2004

☒ Applicant claims small entity status. See 37 CFR 1.27

The fee for filing this Appeal Brief is: \$165.00

- ☒ A check in the amount of the fee is enclosed.
- ☐ The Director has already been authorized to charge fees in this application to a Deposit Account.
- ☒ The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 07-1180
- ☐ Payment by credit card. Form PTO-2038 is attached.

**WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**

Signature

Dated: Sept. 21, 2004

John G. Posa  
Reg. No. 37,424  
Gifford, Krass, Groh  
280 N. Old Woodward Ave., Suite 400  
Birmingham, MI 48009  
Tel. 734/913-9300

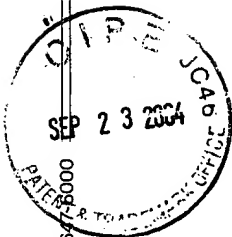
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on Sept. 21, 2004.

*Sheryl L. Hammer*  
Signature of Person Mailing Correspondence

Sheryl L. Hammer

Typed or Printed Name of Person Mailing Correspondence

CC:



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: Venegas, Jr.

Serial No.: 09/779,782

Group No.: 3635

Filed: Feb. 8, 2001

Examiner: S. Varner

For: BARRIER COVER

**APPELLANT'S BRIEF UNDER 37 CFR §1.192**

Mail Stop Appeal Brief  
Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

**I. Real Party in Interest**

The real party and interest in this case is Frank Venegas, Jr., Applicant and Appellant.

**II. Related Appeals and Interferences**

There are no appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**III. Status of Claims**

The present application was filed with 7 claims. Claim 1 was canceled, and claims 8-9 were added in November 2002. Claims 10-21 were added in October 2003. Claims 10 and 13 have been canceled, leaving pending claims 2-9, 11-12 and 14-21. Claims 2-9, 11, 12, 14, and 15 are under appeal.

**IV. Status of Amendments Filed Subsequent  
Final Rejection**

No after-final amendments have been filed.

**V. Concise Summary of the Invention**

The present invention discloses a low maintenance protective cover for use with a substantially semi-circular or arching guard post. Additionally, the cover preferably supports an advertising display for displaying an advertisement, logo, or message (Specification, page 3, lines 2-4). Typically, the arching barrier posts are formed of elongated tubular steel body having a hollow or concrete core that extends substantially semi-circularly between its two opposite ends resulting in these ends and portions of the tubular body, that will subsequently be referred to as legs, being adjacent and separated by a fixed distance with an arching portion bridging the distance between the two legs (Specification, page 3, lines 5-9).

In construction, the post has its opposite ends and a substantial portion of the tubular body embedded in a fixed surface while the vertex of the arch extends outwardly from the fixed surface (Specification, page 3, lines 9-11). The body of the post is typically 6 to 8 inches in diameter, although it is recognized that other configurations may have a diameter greater or less for an intended use (Specification, page 3, lines 12-14). The linear distance that separates substantial portions of the legs of the substantially semi-circular tubular steel body and the two opposite ends is on the order of 50 inches, although, again, other embodiments may command a distance greater or less for an intended use (Specification, page 3, lines 14-17).

In a preferred embodiment, the cover is dimensioned to receive the barrier post in slip-fit engagement and adapted to support an advertising display such as a message of stenciled letters, an electrical/electronic circuit comprising one or more lighting elements configured to display a message or image, one or more magnetically mounted objects of a ferro-magnetic material supported on metallic surface, Velcro materials, peg boards, a chalkboard surface, or combinations thereof (Specification, page 3, line 18 to page 4, line 2). The lighting elements in the cover assembly may be supported by either an internal or external power supply, and the cover assembly may further include an electronic circuit composed of components necessary for power control and management (Specification, page 4, lines 3-5). Preferably, for security purposes, the cover may include a fastening means for securing it to the fixed surface, such as L brackets and screws or other suitable fastening means (Specification, page 4, lines 6-7).

**VI. Concise Statement of Issues Presented For Review**

1. Are claims 2-4 and 8-9 anticipated by U.S. Patent No. 2,678,707 to Finkelstein under 35 U.S.C. §102(b)?
2. Are claims 11, 12 and 15 anticipated by U.S. Patent No. 3,874,103 to Muta under 35 U.S.C. §102(b)?
3. Is claim 5 unpatentable under 35 U.S.C. §103(a) over U.S. Patent No. 2,678,707 to Finkelstein in view of U.S. Patent No. 6,263,601 to Emert?
4. Is claim 7 unpatentable under 35 U.S.C. §103(a) over U.S. Patent No. 2,678,707 to Finkelstein in view of U.S. Patent No. 5,438,950 to Rodrigues?

**VII. Grouping of Claims for Each Ground of Rejection Which Appellant Contends**

Appellant believes the following groups of claims represent patentably distinct inventions which should be given independent consideration on appeal:

Group I: Claims 2 through 9, wherein claims 2 through 7 and 9 stand or fall with claim 8; and

Group II: Claims 11, 12, 14 and 15, wherein claims 12, 14 and 15 stand or fall with claim 11.

**VIII. Argument****Background**

This patent application was filed in February, 2001, over three and one-half years ago. The examination of the application has been poorly reasoned and haphazard. Frustrated, Appellant a first appeal brief in May, 2003. Prosecution was reopened with rejections over prior art that was no more relevant than previously cited references.

In November, 2003, Appellant received a final Office Action, wherein claims 6, 10, 13 and 14 were objected to, and claims 16-21 were allowed. Reasons were allowance were given. To expedite prosecution, Appellant took the objected-to claims and redrafted them in independent form, keeping allowable 16-21 claims, fully anticipating a Notice of Allowance. Instead, in February 2004, Appellant received an Advisory Action, entering the amendment, but stating that claims 2-9, 11, 12, 14 and 15

continued to be rejected. No reasons were given.

Appellant's undersigned representative attempted several telephone calls to the Examiner to clarify the situation, and upon finally making contact, the Examiner stated that the case may or may not be allowable, but again, did not give reasons, stating that he would have to talk to his supervisor. The undersigned tried to explain that Appellant simply took objected-to and allowed claims and formatted them for an allowance, but the Examiner did not seem to understand. Accordingly, to keep the case open, Appellant filed yet another Notice of Appeal.

Several more attempts were made to call the Examiner and his Supervisor, but without satisfaction. Now this appeal brief is being filed on the maximum extension date, causing all involved to expend unnecessary resources and money for no apparent reason.

A. Group I - Claims 2 through 9, wherein claims 2 through 7 and 9 stand or fall with claim 8

In the final Office Action, the Examiner stated that claim 10 is allowable "for the front and back panels smoothly transitioned [sic] through semi-circular side edges corresponding to the tubular metal guard rail." In response, Appellant took the limitation of claim 10 and added it to claim 8, canceled claim 10 and changing the dependency of claims 2-7. Based upon the record, this group of claims should continue to be allowable.

B. Group II - Claims 11, 12, 14 and 15, wherein claims 12, 14 and 15 stand or fall with claim 11

In the final Office Action, the Examiner stated that claim 13 "is allowable for the front and back panels including an advertising display." In response, Appellant took this limitation and put it into claim 11, canceling claims 13, but keeping the dependency of claims 12, 14 and 15 from claim 11. Based upon the record, this group of claims should continue to be allowable.

**Conclusion**

In conclusion, for the arguments of record and the reasons set forth above, all pending claims of the subject application continue to be in condition for allowance and Appellant seeks the Board's concurrence at this time.

Serial No. 09/779,782

- 5 -

42109sh

Respectfully submitted,

By: \_\_\_\_\_

John G. Posa

Reg. No. 34,424

Gifford, Krass, Groh, Sprinkle,

Anderson & Citkowski, P.C.

280 N. Old Woodward, Suite 400

Birmingham, MI 48009

(734) 913-9300

**APPENDIX A**  
**CLAIMS ON APPEAL**

2. The protective cover of claim 8 wherein at least one of the front and back panels includes an advertising display.
3. The protective cover of claim 8 further including a fastener for securing the cover to the guard rail.
4. The barrier cover of claim 2 wherein the advertising display is a message of stenciled letters.
5. The barrier cover of claim 2 wherein the advertising display is an electrical/electronic circuit comprising one or more lighting elements configured to display a message or image.
6. The barrier cover of claim 2 wherein the advertising display is one or more magnetically mounted objects of a ferro-magnetic material disposed on metallic surface.
7. The barrier cover of claim 2 wherein the advertising display is hook-and-loop materials or a chalkboard surface.
8. A cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:  
spaced-apart opaque front and back panels, each having a corresponding bottom edge, opposing side edges and a top edge;  
a side panel connecting the sides and tops of the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and  
wherein the front and back panels smoothly transition through semi-circular side edges

corresponding to the tubular metal guard rail.

9. The cover of claim 8, wherein the side edges smoothly transition in the top edge to create arc-shaped front and back panels that correspond to the semi-circular mid-section of the guard rail.

11. A cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:  
spaced-apart front and back panels, each having opposing bottom edges, side edges, and semi-circular top edges corresponding to the semi-circular mid-section of the guard rail;

a side panel connecting the sides and tops of the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and

wherein at least one of the front and back panels includes an advertising display.

12. The protective cover of claim 11, further including a fastener for securing the cover to the guard rail.

14. The protective cover of claim 11, wherein at least one of the front and back panels is opaque.

15. The protective cover of claim 11, wherein the front and back panels smoothly transition through semi-circular side edges corresponding to the tubular metal guard rail.

16. A cover for a tubular metal guard rail of the type having an outer diameter, two below-ground ends, and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:

spaced-apart, opaque, front and back panels, each having a flat bottom edge and a semi-circular upper portion; and

wherein the semi-circular upper portions of the front and back panels smoothly transition through an integrally formed semi-circular side edge corresponding to the outer diameter of the tubular



metal guard rail, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface.

17. The protective cover of claim 16, further including a fastener for securing the cover to the guard rail.

18. The protective cover of claim 16, wherein at least one of the front and back panels includes an advertising display.

19. A guard rail assembly, comprising:  
a tubular metal guard rail of the type having an outer diameter, two below-ground ends, and a substantially semi-circular above-ground midsection connecting the two ends;  
a guard rail cover including two spaced-apart, opaque, front and back panels, each having a flat bottom edge and a semi-circular upper portion; and  
wherein the semi-circular upper portions of the front and back panels smoothly transition through an integrally formed semi-circular side edge corresponding to the outer diameter of the tubular metal guard rail, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface.

20. The protective cover of claim 19, further including a fastener for securing the cover to the guard rail.

21. The protective cover of claim 19, wherein at least one of the front and back panels includes an advertising display.